BEFORE THE INDIANA CIVIL RIGHTS COMMISSION
319 State Office Building
Indianapolis, Indiana

STATE OF INDIANA)
) SS
COUNTY OF MARION)

THOMAS E. GERARDOT,
and
WALTER BURTON
Complainant

vs. **DOCKET NO. 03243 & 03348**

SUTHERLAND LUMBER COMPANY,
Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On September 23, 1976, a hearing was held before the Indiana Civil rights Commission upon the complaints of Thomas E. Gerardot and Walter Burton alleging that their discharges by Sutherland Lumber Company were unlawful sex discrimination prosribed by the Indiana Civil Rights Law. The Complainants were represented by John H. Pleuss, an attorney on the staff of the Commission, and the Respondent was represented by Leonard Singer, an attorney from Kansas City, Missouri. Evidence, oral arguments, and briefs were submitted by counsel for both parties and were carefully considered.

Prior to the hearing and again during the hearing the Respondent moved that these complaints be dismissed for failure to state a claim upon which relief can be granted. For the reasons set forth in the following Findings of Fact and Conclusions of Law this motion is hereby denied.

FINDINGS OF FACT

1. The Respondent, Sutherland Lumber Company, operates a retail lumber Yard in Fort Wayne, Indiana.
2. The Complainant, Thomas E. Geradot, was employed by the Respondent at its Fort Wayne Facility from the Spring of 1972 until September 25, 1972.
3. The Complainant, Walter J. Button, was employed by the Respondent at its Fort Wayne facility from mid 1971 until October 15, 1972.
4. The duties of both Complainants while employed by Respondent were waiting on customers and filling their orders for lumber and other construction materials.
5. Shortly after he was hired by Respondent, Complainant Gerardot was told by Respondent's Yard Manager, Mr. Ken Sailors, that he could grow a mustache.
6. While Mr. Gerardot was employed by the Respondent approximately fifty percent (50%) of Respondent's male customers at the Fort Wayne location had mustaches.
7. Complainants Burton and Gerardot grew mustaches while they were employed by Respondent.
8. Mustaches were permitted by Respondent until September 1972.
9. In September of 1972 a high official of Sutherland Lumber Company instructed Mr. Sailors that facial hair on employees was no longer allowed.
10. Mr. Sailors informed Mr. Gerardot on or about September 21, 1972 that he would have to shave off his mustache.
11. Complainant Gerardot refused to shave off his mustache, and on September 25, 1972 he was terminated for not shaving off his mustache.
12. Complainant Geradot's salary while employed at Sutherland Lumber Company was $580.00 per month.

13. Immediately following his termination Mr. Geradot actively sought other employment. On October 15, 1972 Complainant Gerardot obtained other employment thus fulfilling his duty to mitigate his damages.
14. Complainant Geradot was unemployed for two-thirds of the month. Complainant Gerardot suffered damages of $386.67 in lot wages. Complainant does not wish to be reinstated to his former position.
15. Complainant Walter Burton told to shave off his mustached by October 15, 1972 or he would be involuntarily terminated.
16. Complainant Burton refused to shave off his mustache, and a few days before October 15, 1972 he was told that since he refused to shave off his mustache he did not have to work the last few days, and he was terminated effective October 15, 1972
17. Though Mr. Burton's complaint raises the issue of whether he was discharged because of the length of his hair, as well as is having a mustache, no evidence was presented concerning his hair length. Rather the evidence presented indicates that he was terminated because of his failure to shave off his mustache.
18. Complainant Burton's salary at the time of his termination was 737.20 per month.
19. Immediately following his termination, Mr. Burton actively sought other employment. On January 1, 1973 Complainant Burton obtained other employment, thus fulfilling his duty to mitigate his lost wages.
20. Complainant Burton was unemployed for a period of two and one half months because of his termination by Respondent.
21. During this two and one half month period, Complainant Burton suffered damages of $1843.00 in lost wages. Complainant Burton wishes to be reinstated to his former position with Respondent at a wage, which he would not be receiving if he had not been terminated by Respondent.

CONCLUSIONS OF LAW

1. Respondent, Sutherland Lumber Company, is an employer within the meaning IC 22-9-1-3(h).
2. Complainants Thomas E. Geradot and Walter Burton have timely filed, pursuant to IC 22-9-1-3(o), valid complaints charging sex discrimination in employment.
3. Males, as well as females, are protected from sex discrimination by the Indiana Civil Rights Law, IC 22-9-1.
4. The legislature has mandated that the Indiana Civil Rights Law is to be construed broadly to effectuate its purpose of promoting equal opportunity without regard to race, religion, color sex, national origin or ancestry, IC 22-9-1-2(b) and (3).
5. Policies, practices and procedures which are neutral on their face and even neutral in terms of intent may be discriminatory if they have an adverse disparate effect on a class protected by the Indiana Civil Rights Law and not justified by business necessity, G*riggs v. Due Power Company* 401 U.S. 424 (1971).
6. A grooming code which required males, but not females, to have short hair was declared violative of the Indiana Civil Rights Law in *Hassell v. Safeway Quality Foods* (ICRC, 1975), Docket No. 03186. A complaint charging sex discrimination in termination for failure to shave off a beard was ruled to state a claim upon which relief may be granted under the Indiana Civil Rights Law in *Earley v. The Trustees of Indiana University*, (ICRC Interlocutory Order, February 20,1976) Docket No. 0-7243 (case still pending). These are the only decisions extant concerning grooming standards and the Indiana Civil Rights Law.
7. There is a body of law in the federal courts concerning grooming standards and Title VII of the 1964 Civil Rights Act, 42 U.S. 2000e, *et seq.* The majority approach in these cases is that grooming standards are not covered by the act since:

1. Title VII covers only immutable characteristics or fundamental rights, 2. Hair length and the presence of facial hair is no immutable, and 3. Hair length and the presence of facial hair is not a fundamental right. *Fagan v. National Cash Register Co.* (C.A, of D.C., 1973) 481 F.2d 1115. 8. After careful consideration of the rationale of the *Fagan* case and its progeny we decline to adopt this analysis for the following reasons:

a. There is no indication in the language of the statutes that either immutable characteristics or fundamental rights. Furthermore, ample precedent exists under Title VII that acts concerning neither fundamental rights nor immutable characteristics have been held to violate the act: bilingual person prohibited from speaking Spanish on the premises EEOC Decision No. 71-446 (1970) CCH EEOC Decisions para. 6293); female employees prohibited from smoking while male employees allowed to smoke, EEOC Decision No. 70-503 (1970) CCH EEOC Decision para. 6113; females required to wear contact lenses instead of glasses while males allowed to wear glasses, *Laffey v. Northwest Airlines, Inc.* (D.C. of D.C., 1973) 336 F. Supp. 763; females required, *Gerdom v. Continental Air lines, Inc.* (D.C. Cal., 1974) 8 E.P.D. para. 9788.

b. Hair length and the presence of facial hair are not truly mutable. To be truly mutable, a characteristic should be capable of change in both directions with equal ease. An example of such a characteristic is the wearing of a uniform one can put it on or take it off with approximately equal effort and time. Such is not the case with the wearing of a beard or long hair. Long hair may be shorn, and a mustache or beard may be shaved off n a few minutes time, but to grow them back generally takes a month or more. This is an important distinction. It means that an employee must live with hair restrictions twenty-four hours a day, seven days a week, every day of the year. An employee required to wear a uniform (or a suit and

tie) which he or she finds objectionable may at least, promptly change clothes after work and thereby relax on weekends and holidays in more comfortable attire. The unfortunate male subject to long hair or facial hair restrictions does not have this privilege because of the time required for the hair to grow back.

c. The bold assertion that long hair and facial hair are not fundamental rights is inconsistent with the case law. A number of federal circuits have held that wearing long hair is constitutionally protected: *Richards v. Thurston* (C.A. 1, 1970) 424 F.2d 1281, 1284; *Friedman v. Foehlke* (C.A. 1, 1972), 470 F.2d 1351, 1353; *Dwen v. Barry* (C.A. 2, 1973), 483 F.2d 1126, 1130; *Gere v. Stanley* (C.A. 3, 1971), 453 F.2d 205; *Stull v. School Board*(C.A. 3 1972), 459 F.2d 339; *Massie v. Henry* (C.A. 4, 1972), 455 F2d 779, 783; *Breen v. Kahl* (C.A. 7, 1969) 419 F. 2d 1034; *Crews v. Cloncs* (C.A. 7, 1970) 432 F.2d 1259; *Armold v. Carpenter* (C.A. 7, 1972), 459 F.2d 939.

d. A theme underlying the *Fagan* decision (and other decisions which reached the same result(is that if an employer's customers are thought not to like persons with long hair or facial hair then the employer can refuse to hire individuals with this characteristic. This reliance on customer preference has not generally been recognized as an excuse to discriminate. In *Dias v. Pan American Airways, Inc.* the Fifth Circuit Court of Appeals held that an airlines could not refuse to employ males as flight attendants because the airlines customers preferred females in this position:

> …Indeed, while we recognize that the public's expectation of finding one sex in a particular role may cause some initial difficulty, it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid

> was valid. Indeed, it was, to a large extent, these very prejudices that Act was meant to overcome…442 F.2d 385 (1971), cert. denied 404 U.S. 950.

Similarly, customer preference does not justify hiring a male as a cosmetologist instead of a female, *Witt v. Secretary of Labor* (D.C. Me., 1975), 397 F. Supp. 673; and it does not justify replacing waiters with waitresses, *Guardian Capitol Corp. d/b/a Ramada Inn v. New York State Division of Human Rights* (N.Y.S. Ct. App. Div., 1975) 368 N.Y. 2d 594, 48 A. 2d 753; and it does not justify refusing to hire a female as a baseball umpire, *N.Y. State Div. of Human Rights v. N.Y. –Pa. Professional Baseball League* (N.Y.S. Ct. App. Div., 1971) 35 A.D. 2d 364; aff'd (N.Y. Ct. App., 1972) 29 N.Y. 2d 921; and it does not justify refusing to let a male nurse minister to female patients and thus limiting his employment opportunities, *Wilson v. Sibley Memorial Hospital (D.C. of D. of C., 1972),* 340 F. Supp. 686; rev'd and rem'd on other issue *sub. nom. Sibley Memorial Hospital v. Wilson* (C.A. of D. of C., 1973) 488 F.2d 1338.

The lesson from all of these cases is that when customers have sexual stereotypes concerning employment, the employer has a duty to ignore these stereotypes and demonstrate through equal opportunity employment practices that what matters is not the stereotype but rather the employee's ability to o the job in question.

e. Finally, though it has not been mentioned in other facial hair cases, facial hair is, in fact, a secondary sex characteristic caused by a male hormone produced in the testes Respondent's policy requires male employees to artificially alter this natural characteristic peculiar to their sex.

9. We therefore conclude that the Respondent; Sutherland Lumber Company, has engaged in an unlawful discriminatory practice, as that term is defined in IC 212-9-1-3(1), by terminating the employment of Complainants Burton and Geradot for their non-compliance with Respondent's no mustache policy.

ORDER

IT IS HEREBY ORDERED THAT:

1. Respondent shall, on or before fifteen (15) days from the date of this order, deliver to the Indiana Civil Rights Commission, as escrow agent for the Complainants, two certified checks reimbursing the Complainants for lost wages. One check shall be in the sum of $386.67 payable to Thomas E. Geradot. The other check shall be in the sum of $1843.00 payable to Walter J. Burton.

2. Respondent shall, within thirty (30) days of the date of this order, notify each of its employees in Indiana that its previous policy forbidding employees from having mustaches or beards is hereby revoked. This shall be accomplished by posting, in a place normally used for the display of information to employees (such as an employee bulletin board), in each store Respondent operates in Indiana, together with a copy of these Findings of fact, Conclusions of Law, and Order, a memorandum stating that the policy against facial hair reported in previous communications is revoked, that henceforth male employees will be allowed to wear neatly trimmed mustaches and/or beards. A copy of this memorandum shall be sent to the Indiana Civil Rights Commission within thirty (30) days of the date of this order.

3. Respondent shall make no new policy forbidding neatly trimmed mustaches or beards.

4. Respondent shall not base any decisions regarding rate of pay, hours of work, discipline or commendation, promotion or demotion, or any other terms or conditions of employment, in part or in whole on the presence or absence of facial hair so long as the facial hair is neatly trimmed.

5. Respondent shall, within thirty (30) days of the date of this order, offer to Complainant Walter J. Burton reinstatement to his former position of salesman at a wage no less than that currently being received by the average, competent salesman at Respondent's Forth Wayne store who has been employed for a length of time Complainant Burton would have been employed had his employment continued to the present time. Such offer of reinstatement shall be in writing and shall include seniority and all other benefits appertaining to employment at Sutherland Lumber Company from the date of Mr. Burton's hiring in 1971 through the date of his reinstatement. Complainant Burton will have fifteen (15) days from his receipt of this offer to determine whether he want to accept the offered employment. Such reinstatement shall be effective within fifteen (15) days of Complainant's acceptance.

Respondent is hereby notified that a copy of this decision is being sent to the Indiana Department of revenue pursuant to IC 22-9-1-6 (k) (1) and Rule 14.1 (Ind. Admin. R. and Reg. § (40-2312)-55 (Burns Supp 1976)) of the Indiana Civil Rights Commission. If this order is not complied with, Respondent will be required to show cause to the above agency why its Retail Merchants Certificate should not be revoked for violating the Indiana Civil Rights Law. Additionally enforcement of this order will be sought through the local circuit or superior court if necessary.

Signed: December 17, 1976

Reversed: Indiana Civil Rights Commission v. Sutherland Lumber, 394 N.E. 2d 949 (Ind App. 1979)